No. 88-554

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS,
BILL MCCUEN, SECRETARY OF STATE OF ARKANSAS, AND
STEVE CLARK, ATTORNEY GENERAL OF ARKANSAS,
IN THEIR RESPECTIVE OFFICIAL CAPACITIES AND IN
THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE
BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS;
LILBURN W. CARLISLE, CHAIRPERSON OF THE ARKANSAS
STATE COMMITTEE OF THE DEMOCRATIC PARTY;
TOMMYE S. GIVENS, SECRETARY OF THE ARKANSAS
STATE COMMITTEE OF THE DEMOCRATIC PARTY; THE
DEMOCRATIC CENTRAL COMMITTEE OF CRITTENDEN
COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; THE
REPUBLICAN CENTRAL COMMITTEE OF CRITTENDEN
COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; AND
THE ELECTION COMMISSION OF CRITTENDEN COUNTY,
ARKANSAS, ITS OFFICERS AND MEMBERS ..... *Petitioners*

vs.

ELBERT SMITH, VICKIE MILES ROBERTSON,
JOHNNY MAE WILLIAMS, MAXINE BOHANNON, CAROLYN
STEPHENSON, ESTER CAGE, FAYE WILLIAMS, DARRICK
HANDY, ANTHONY R. HOLMES, CAROL HOLMES,
AND MAGGIE HALL ..... *Respondents*

APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JURISDICTIONAL STATEMENT

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56 pp

QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW IMPROPERLY PERMITTED A CLAIM UNDER SECTION II OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED, 42 U.S.C. §1973, TO BE MAINTAINED AGAINST ONE DISTRICT OF A STATEWIDE ELECTION SYSTEM AS DISTINGUISHED FROM THE ENTIRE SYSTEM ITSELF.

II.

WHETHER THE COURT BELOW IMPROPERLY EXPEDITED THIS ACTION AND CONDUCTED A TRIAL ON THE MERITS LESS THAN THREE AND ONE HALF MONTHS AFTER PLAINTIFFS FILED THEIR COMPLAINT, THUS DEPRIVING PETITIONERS OF AN OPPORTUNITY TO PREPARE ADEQUATELY.

III.

WHETHER THE COURT BELOW IMPROPERLY BASED ITS FINDING THAT THE MULTIMEMBER LEGISLATIVE DISTRICT VIOLATED SECTION II OF THE VOTING RIGHTS ACT SOLELY UPON EVIDENCE OF RACIALLY POLARIZED VOTING IN EIGHT BLACK VERSUS WHITE ELECTIONS AND UPON THE FACT THAT NO BLACK HAD PREVIOUSLY WON A SEAT IN THE ARKANSAS HOUSE OF REPRESENTATIVES FROM THE DISTRICT IN ISSUE.

IV.

WHETHER THE COURT IMPROPERLY VOIDED THE MARCH 8, 1988 PRIMARY ELECTION AND ORDERED A SPECIAL PRIMARY ELECTION, WHICH IS TO BE HELD ON SEPTEMBER 20, 1988. WHEN THERE WAS NO

EVIDENCE OF RACIAL DISCRIMINATION IN THE ELECTORAL PROCESS IN QUESTION AND THERE WAS NO EVIDENCE OF LOW VOTER PARTICIPATION IN THE BLACK COMMUNITY.

V.

WHETHER THE COURT BELOW IMPROPERLY ADDED NEW PARTIES DEFENDANT, SUA SPONTE, IN ITS JULY 1, 1988 JUDGMENT WHEN THOSE NEW DEFENDANTS HAD NOT PARTICIPATED IN ANY OF THE PROCEEDINGS PRIOR TO THE ENTRY OF JUDGMENT.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this action, the following are parties to this proceeding:

Democratic Central Committee of Crittenden County, Arkansas: Solon Anthony, Howard Atkins, Primo Baioni, Jimmy Barham, Earl Beck, Al Boals, Cy Bond, Darla Brasfield, Ollie Brown, Milio Brunetti, Buddy Burgos, John Criner, Zelma Danton, Berrell Fair, Frank Fogleman, John Gregson, Frank Hill, Paul Matthews, Paul O'Neal, June Paudert, Mack Ray, Marvin Rogers, Mike Sample, Dave Thomas, Charlie Wah, Erma Whitacre, and Marge Woolfolk.

Republican Central Committee of Crittenden County, Arkansas: Joe Baker and Mrs. Barbara Dodge.

Election Commission of Crittenden County, Arkansas: Joe Baker, Kent Rubens, and David Thomas.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

OPINION BELOW 1

GROUNDS OF JURISDICTION OF SUPREME COURT 2

STATUTE IN ISSUE 3

STATEMENT OF THE CASE 4

SUBSTANTIALITY OF FEDERAL QUESTIONS 8

CONCLUSION 14

APPENDIX

A. Opinion Finding Liability Under Section 2 ..... A-1—A-17

B. Denial of Petitioners' Motion for New Trial ..... B-1—B-2

C. Opinion Concerning Remedy ..... C-1—C-5

D. Judgment ..... D-1—D-4

E. Notice of Appeal ..... E-1—E-3

TABLE OF AUTHORITIES

CASES: PAGE

Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967) 11

Citizens for a Better Gretna v. Gretna,
834 F.2d 496 (5th Cir. 1987).....8

Coalition for Education, District 1 v.
Board of Elections of the City of New York,
370 F. Supp. 42 (S.D.N.Y. 1974),
affd, 495 F.2d 1090 (2nd Cir. 1974).....12

Collins v. City of Norfork, 679 F. Supp. 557
(E.D. Va. 1988).....8

Gingles v. Edmisten, 590 F. Supp. 345
(N.D.N.C. 1984).....12

Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966),
cert. denied, 385 U.S. 851 11

Hart v. King, 470 F. Supp. 1195 (D. Haw. 1979).....12

Hinden v. North Carolina State Board of
Elections, 710 F.2d 177 (4th Cir. 1983) 11

Major v. Treen, 547 F. Supp. 325 (E.D.La. 1983) 12

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct.
2752, 92 L.Ed.2d 25 (1986).....8

Toney v. White, 488 F.2d 310 (5th Cir. 1973).....12

Tucker v. Burford, 603 F.Supp. 276 (N.D. Miss 1985) 12

United States v. Louisville Municipal School
District, 557 F. Supp. 1168 (N.D. Miss. 1983) 12

CONSTITUTIONAL PROVISIONS: PAGE

Arkansas Constitution, Article 8, Section 4 5

United States Constitution, Amendment 14 4

United States Constitution, Amendment 15 4

STATUTORY PROVISIONS:

28 U.S.C. 1331 2

28 U.S.C. 1343(3) 2

28 U.S.C. 1343(4) 2

28 U.S.C. 2201 2

28 U.S.C. 2202 2

42 U.S.C. 1973 3

42 U.S.C. 1973j(f) 2

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS, BILL MCCUEN, SECRETARY OF STATE OF ARKANSAS, AND STEVE CLARK, ATTORNEY GENERAL OF ARKANSAS, IN THEIR RESPECTIVE OFFICIAL CAPACITIES AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS; LILBURN W. CARLISLE, CHAIRPERSON OF THE ARKANSAS STATE COMMITTEE OF THE DEMOCRATIC PARTY; TOMMYE S. GIVENS, SECRETARY OF THE ARKANSAS STATE COMMITTEE OF THE DEMOCRATIC PARTY; THE DEMOCRATIC CENTRAL COMMITTEE OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; THE REPUBLICAN CENTRAL COMMITTEE OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; AND THE ELECTION COMMISSION OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS ..... *Petitioners*

VS.

ELBERT SMITH, VICKIE MILES ROBERTSON, JOHNNY MAE WILLIAMS, MAXINE BOHANNON, CAROLYN STEPHENSON, ESTER CAGE, FAYE WILLIAMS, DARRICK HANDY, ANTHONY R. HOLMES, CAROL HOLMES, AND MAGGIE HALL ..... *Respondents*

APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court is as yet unreported and is included herein in the Appendix.

GROUNDS OF JURISDICTION OF SUPREME COURT

This is an appeal from the judgment in an action arising under the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Respondents challenged the multimember district used to elect two members of the Arkansas House of Representatives from Crittenden County, Arkansas, on the ground that the at-large system of voting for the two representatives from that district unlawfully diluted black voting strength. Jurisdiction is conferred on the three-judge district court by 28 U.S.C. §§1331, 1343(3) and (4), 42 U.S.C. §1973j(f), and 28 U.S.C. §§2201, 2202. Judgment of the District Court was entered on July 1, 1988. Timely notice of appeal was filed on July 29, 1988, in the Supreme Court of the United States. Jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1253.

STATUTE IN ISSUE

The statute in issue is 42 U.S.C. §1973, which provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE CASE

The respondents are black residents of Crittenden County, Arkansas. Petitioners are the Governor, Secretary of State, and the Attorney General of Arkansas, officials of the Democratic and Republican Parties of Arkansas, and the Election Commission of Crittenden County, Arkansas. Respondents filed their complaint on January 15, 1988, which challenged the multimember structure of the Arkansas Legislature's District 48-49 of the Arkansas House of Representatives. Respondents claimed the two-member legislative district violated Seciton II of the Voting Rights Act of 1965 (42 U.S.C. §1973 *et seq.*) and the Fourteenth and Fifteenth Amendments to the United States Constitution. They asked for a declaratory judgment that District 48-49 violated those statutory and constitutional provisions, and requested that the court enjoin the primary election in Arkansas, which was scheduled for March 8, 1988. Alternatively, respondents asked the court to void the results of that election and order a new election.

Petitioners denied any statutory or constitutional violation. They also raised the defense of laches because respondents filed their lawsuit virtually on the eve of the upcoming primary election even though the districting scheme in question had been in effect for more than seven years, having had three elections held under it. Petitioners also contended that the action was barred by the applicable statute of limitation, and that Section II, as well as the constitutional protections asserted by respondents, did not permit challenges to single districts out of state-wide apportionment plans. Respondents' motion to enjoin the March 8, 1988 election was denied on February 16, 1988 following an evidentiary hearing. The court primarily based its denial of that motion on the doctrine of laches because, even though the apportionment scheme had been in effect since July 13, 1981, respondents had waited for more than seven years to challenge it. Reapportionment occurs every ten years in Arkansas, following each

Federal census. Ark. Const. art. 8, section 4.

On March 10, 1988, the court notified the parties that the case was set for trial 46 days later, on April 25, 1988. After it became apparent that petitioners' experts required additional time to prepare, petitioners moved for continuance of the trial on April 18, 1988. The trial court denied that motion.

Following the April 25-26 trial, the three-judge court issued its opinion on May 16, 1988, in which it found that there was no discriminatory intent in the formation of District 48-49. Therefore, the Court held there was no constitutional violation in the creation or maintenance of that district.

However, the Court did find that the district, as drawn, effectively "deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice," thus violating Section II of the Voting Rights Act. That finding was based upon evidence that voting in the district was racially polarized when black candidates ran against white candidates and that minority group members have not won elections in proportion to their numbers in the population. The court held these to be the "essential elements of [respondents'] claim," and discounted the other factors that should have been considered in deciding whether a violation of Section II existed.

During the two-day trial, respondents presented evidence, based on 1980 census data, that approximatley 42 percent of the population of the district in issue was black, and that 37 percent of the voting age population was black. It was stipulated that no black person had been elected to the Arkansas House of Representatives from the district. A Mr. Allen Lichtman, an expert witness for respondents, evaluated a total of eight races in which black candidates ran against white candidates during the years 1978, 1982, 1985, 1986, and 1988. One of those races was the 1988 Democratic

Presidential primary in which Jesse Jackson was a candidate. Based on the voting patterns in those eight races, Lichtman testified that the voters were severely polarized and that racial block voting was present within the district. Respondents produced no evidence that blacks in the district were hindered from participating fully in the electoral process.

Petitioners' expert, Dr. Harold Stanley, evaluated 65 other races within the district in which there were no black candidates. In 54 of those races, the black-preferred candidate was elected. Petitioners presented additional evidence of vigorous political participation by blacks in the district's political processes, including evidence that blacks were registered to vote in greater proportion to their total population than were whites.

Based on this evidence, the court below found a violation of Section II of the Voting Rights Act. The court took judicial notice of a history of racial discrimination in the electoral process in Arkansas, and inferred that such history necessarily inhibited full participation in the political process by blacks. However, the court did find that the district in issue was not unusually large, that there was no discriminatory intent in the formation of the district, that there was no present lack of responsiveness to the needs of blacks in the district, and that no overt or subtle racial appeals had been made in elections within the district. Accordingly, no constitutional violation was found.

In its May 16 opinion, the court held that the May 8, 1988 primary election for state representative should be set aside and that District 48-49 should be split into two separate districts in time for a special primary election to be held before the November, 1988 general election. After a hearing on June 6, 1988, the court issued its final judgment on July 1, 1988. It ordered that a plan submitted by the respondents, which split District 48-49 into two separate districts, be adopted and that a

special election be held on September 20, 1988, with a primary runoff (should one be necessary) on October 4, 1988. The court further ordered that several local party officials and the two local political party branches in Crittenden County be added as defendants to effectuate its order. On July 7, 1988, the court issued another opinion explaining that it adopted the respondents' districting plan, which included one district that was to be approximately 65% black, because it felt, based on national data, that such a super-majority was necessary to give blacks a fair opportunity to elect the candidates of their choice. The court noted that petitioners had stated that any plan that split the district would interfere with the state-wide scheme of apportionment.

After the liability finding, petitioners filed an alternative motion for new trial or motion to dismiss for failure to state a claim for relief, which was based on the issues raised in this appeal. The court denied petitioner's motion. Final judgment was entered July 1, 1988. Petitioners filed their notice of appeal to the Supreme Court on July 29, 1988, and requested a stay from the trial court on the same date. The stay request was denied on August 3, 1988.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that it presents this Court with an opportunity to clarify several of the issues clouded by the severely divided Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). One such issue is the standard for determining voter polarization, an important consideration by the court in *Thornburg*. Petitioners argue that a majority of the *Thornburg* court did not limit evidence for polarization to just black/white contests, nor did it indicate polarization in that subset of election contests could not be overcome by evidence of lack of polarization in the pattern of all election contests. Different lower courts have taken different views of this issue. Compare, *Collins v. City of Norfork*, 679 F.Supp. 557 (E.D.Va. 1988), with *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987).

The Court in *Thornburg* defined legally significant polarization as occurring when "a white bloc vote normally [defeats] the combined strength of minority support plus white cross over votes." 106 S.Ct. at 2770. The critical portion of the Court's opinion for the issues raised in this case is Part III. C. entitled "Evidence of Racially Polarized Voting." There was no majority view as to what evidence is relevant to the determination. The primary disagreement, however, was not whether voter behavior in white/white contests was relevant. That issue was not before the Court because neither party had introduced such evidence at trial. Rather the disagreement among the justices concerned the significance of the reasons that black and white voters voted differently.

The state in *Thornburg* claimed that the plaintiffs had to establish that candidates supported by black voters were rejected because of their identification with the black community; that absent further analysis, plaintiffs could not demonstrate that the difference in support was not explainable

by non-racial factors. Defendants argued that the bivariate analysis should have been a multivariate analysis. A plurality of the Court supported Justice Brennan's view that a bivariate analysis was sufficient. Voter behavior, not the reasons for that behavior, was what mattered.

Five members of the Court disagreed with Justice Brennan on this point. Justice O'Connor spoke for herself and three others when she said "I do not agree, however, that such evidence [evidence of why white voters voted as they did] can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected for reasons other than those which made the candidate the preferred choice of the minority groups would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections." 92 L.Ed.2d at 78-79.

Justice White held the tie-breaking vote on this issue. He, too, disagreed with Justice Brennan on the relevance of matters other than the mere difference in voter behavior in determining the existence of polarized voting. He gave an example in which black candidates who are not the candidates of choice of the black community are elected in a contest with white candidates. He apparently would not find this to be a racially polarized contest, noting that such a view of polarization would result in "interest group politics rather than a rule hedging against racial discrimination." 92 L.Ed.2d at 68.

On the issue of the relevance of "white-white" contests, Justice Brennan specifically indicated that it was the status of the candidate as a chosen representative of a particular racial group, not the race of the candidate that was important. To take the position that blacks were deprived of equal partici-

pation unless they could elect any black candidate they preferred, even though they consistently elected white candidates who solicited their votes and were responsive to their needs, fostered "interest group" politics, not anti-discrimination.

In *Collins v. City of Norfork*, 679 F.Supp. 557 (E.D.Va. 1988), the court clearly adopted the view that outcomes in election contests of "white-white" races were relevant:

> "The Supreme Court clearly contemplates that a candidate of choice of the black community may be of any race, and need not be black, as it consistently refers to the minority's preferred candidate, or candidate of choice, rather than the minority candidate. . . . No justice said that a black preferred candidate must be black."

Id. at 572.

The *Collins* court found that the black-preferred candidates had been proportionately elected. Had the court in the instant case applied a similar standard concerning the "black preferred candidates," it would have been compelled to conclude that black voters in District 48-49 have achieved proportional election of those candidates. The uncontroverted testimony of defendants' expert witness, Dr. Harold Stanley, established that since its creation in 1981, District 48-49 has been represented by at least one House member who was the preferred candidate of a majority of black voters. Utilizing this Court's district-wide perspective, this success constitutes more than proportional representation for the district's black voters who have elected fifty percent of the representatives but are only thirty-five percent of the district's voters.

This issue will be central in almost all future cases under Section II. The question of whether one-race elections can be ignored and total reliance placed on black/white elections

must be answered by this Court. This appeal presents the opportunity for it to do so.

Other issues to be raised on appeal include whether a Section II claim can be brought in the context of challenging just one district rather than an entire apportionment scheme of a state; whether the unnecessarily short time for trial deprived defendants of an opportunity to adequately prepare for trial and thus deprived the court of the searching inquiry necessary to find a Section II violation; and whether the court can ignore the Senate factors and decide a Section II claim based strictly on the existence of racially polarized bloc voting in black-versus-white races and depressed socioeconomic status for blacks. These are all important and, in some instances, frequently raised issues in Section II cases. Courts, Section II litigants and potential litigants need guidance on these matters to be able to resolve these cases properly.

A second important and substantial question concerns the remedy imposed by the court below. As a remedy for the violations of Section II it found, the lower court ordered that the March 8 primary in District 48-49 be declared null and void and that a special election be held to fill seats 48 and 49 pursuant to the new districting plan it adopted. The imposition of such a remedy by a federal court has been described by the Fifth Circuit Court of Appeals as "drastic, if not staggering." *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967). The voiding of a state election is "a form of relief to be guardedly exercised." *Id.*, citing *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966) cert denied 385 U.S. 851, 87 S.Ct. 76, 17 L.Ed.2d 79 (1966). Indeed, the court in *Bell* would approve such relief only after it found the nature of the violation there "gross, spectacular, [and] completely indefensible." *Id.* at 664. The general rule is to deny relief with respect to past elections, enjoining only future elections. *Hinden v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983). Where there is no evidence that election officials practiced invidious discrimination or

egregious conduct in holding elections, setting aside past elections is not justified. *U.S. v. Louisville Municipal School District*, 557 F.Supp. 1168, 1172 (N.D. Miss. 1983).

In deciding matters of relief,

> "Courts will consider granting post-election relief only where the plaintiffs were not aware of a major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief."

Hart v. King, 470 F.Supp. 1195 (D. Hawaii 1979). Indeed, plaintiffs' diligence in asserting timely claims prior to election is an important factor in determining whether an election should be set aside. *Coalition for Education, District 1 v. Board of Elections of the City of New York*, 370 F.Supp. 42 (S.D.N.Y. 1974), aff'd 495 F.2d 1090 (2d Cir. 1974). Parties having grievances based on discriminatory election practices have a duty to bring the grievances forward promptly for pre-election adjudication. *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973). Plaintiffs who fail to make timely challenges to elections, when the information upon which they make their case is available to them prior to the election, cannot have those elections voided as part of their relief. *Tucker v. Burford*, 603 F.Supp. 276 (N.D. Miss. 1985). In such instances, plaintiffs have waived their right to such relief. *Id.* at 279.

In the case at bar, the apportionment plan that created District 48-49 was adopted on July 13, 1981. Section II of the Voting Rights Act was amended in the spring of 1982, to allow the use of the "results test." Numerous actions against state apportionment plans were instituted within months of the amendment's passage. *See, e.g., Gingles v. Edmisten*, 590 F.Supp. 345 (N.D. N.C. 1984), *Major v. Treen*, 547 F.Supp. 325 (E.D.La. 1983). However, the respondents in this action waited through three elections under the apportionment plan in issue until the eve of the fourth election to challenge it. Other than

with regard to the March 8 primary election, no facts were presented by the respondents that were not in existence shortly after the 1986 Primary. Indeed, all the census data relied upon by respondents was from the 1980 decennial census.

Certainly, this is not the diligence required of Section II plaintiffs in order for them to obtain the drastic remedy of voiding a past election. All the facts respondents needed to file this lawsuit were available early in the 1980s so that the suit could have been filed and the merits adjudicated prior to the 1988 elections. The respondents, having failed to exercise diligence in this regard, have waived their right to the extraordinary relief of voiding a state election.

Furthermore, the findings of the court indicate that the election voided by the court was not marked by invidious discrimination or such egregious conduct by election officials that it should have been set aside. Indeed, the court specifically found that there was no discriminatory intent in the formation of District 48-49 and that there was no present lack of responsiveness to the needs of blacks on the part of officials in the district. Additionally, the court found that there was no indication of overt or subtle racial appeals in campaigns in the district. Finally, there is no indication in the record that election officials in the district engaged in any discriminatory practices. That being the case, the extreme, drastic and highly disfavored remedy of voiding the election and calling a special election is certainly not proper in this case.

CONCLUSION

For the reasons stated above, petitioners submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated Sept. 27, 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Steven Clark, Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to the following counsel, on this 27th day of September, 1988.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION
NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

ARNOLD, Circuit Judge.

The issue in this case is whether at-large voting for two seats in the Arkansas House of Representatives from dual-

member District 48-49 in Crittenden County denies black voters an equal opportunity to participate in the political process, in violation of section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973.[1]

We have made a careful, practical assessment of the impact of the challenged multimember structure, "in the light of past and present reality, political and otherwise." See *White v. Regester*, 412 U.S. 755, 769-70 (1973). We now hold that the plaintiffs have demonstrated a violation of their rights under federal law. The crux of our decision is this: at-large election of representatives in this multimember structure so dilutes the voting strength of black residents of the district as virtually to guarantee that no black person will ever be elected State Representative in Crittenden County.

The Court also finds that it is feasible to divide District 48-49 into two contiguous, rationally sized legislative districts, with black voters in the majority in one of the districts. Accordingly, we hold that the March 8, 1988 primary election for State Representative from the district must be set aside, and a plan to divide District 48-49 into two districts must be implemented in time for a special primary election to be held before the November 1988 general election. The order of this Court is intended to affect no portion of the Arkansas legislative apportionment structure except that in District 48-49.

I.

Members of the Arkansas House of Representatives are elected every two years for two-year terms. Ark. Const. Art. V, §2. Candidates for the Legislature must obtain a majority of the vote in order to win party nomination. Ark. Code Ann.

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[1]On April 26, 1988, at the end of a two-day trial, we announced findings and conclusions from the bench, stating that a formal opinion would be filed in due course. This is that opinion.

§§7-7-102(a), 7-7-304(2) (1987). If no candidate receives a majority of votes in the primary, a run-off election is held. Ark. Code. Ann. §7-7-304(3) (1987). The parties have stipulated that seventy-four of the one hundred members of the State House of Representatives are elected from single-member districts.

House District 48-49 is a single geographic entity from which two State Representatives are elected through at-large voting. Candidates designate District 48 or District 49 as the seat for which they choose to run. District 48-49 is located entirely within Crittenden County, and encompasses most of the county's area and ninety-four percent of its population. There is no subdistrict-residency requirement for State Representative candidates.

According to estimates based on 1980 census data, approximately forty-two percent of the population of District 48-49 is black, and about thirty-seven percent of the district residents who are of voting age are black. No black candidate has ever been elected State Representative from District 48-49; nor has any black person been elected to the Arkansas General Assembly from Crittenden County in the Twentieth Century.

Plaintiffs Elbert Smith and others, black registered voters in District 48-49, filed this action on January 15, 1988, challenging on statutory and constitutional grounds the multimember structure of the district. The defendants include the Governor, Secretary of State, and Attorney General of Arkansas (members of the State Board of Apportionment), and the principal officers of the Democratic and Republican parties in the State. Plaintiffs alleged that the multimember legislative district adversely affects the opportunity for black residents to participate in the political process, in violation of the Voting Rights Act of 1965, the Fourteenth and Fifteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. The plaintiffs also moved to enjoin the March 8, 1988 primary election for State Representatives from the district.

On February 16, 1988, this Court held a hearing on the plaintiffs' motion for a preliminary injunction. After hearing evidence for a day, we denied the motion, stating our reasons from the bench. The plaintiffs, we said, had shown a strong likelihood of success on the merits, but we could not say at that early stage of the case that defendants' chances were negligible. Candidates had already filed and done a good deal of campaigning. It seemed best to let the election be held, subject always to our ability to set it aside, if plaintiffs should win at the trial on the merits, in time to re-run the election in single-member districts in 1988. In making this decision we were heavily influenced by a reluctance to interfere with state election processes on less than a full record.

So the primary election[2] was held on March 8. State Representative Lloyd McCuiston, who is white, ran for one seat without opposition, and he was renominated. State Representative James Stockley, who is white, defeated Ben McGee, who is black, for the nomination for the other seat. The trial on the merits of this case followed on April 25 and 26.

II.

Initially, we address the defendants' contention that we need not reach the merits of this case. The defendants suggest that the plaintiffs are barred because of the passage of time since the State Board of Apportionment formulated the present state-wide plan in 1981. The necessary premise of this argument is that unless voters challenge an apportionment plan promptly upon its being put into effect, they are barred from contesting a district until a subsequent reapportion-

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[2]We refer to the Democratic primary. No one filed for the Republican nomination for either seat.

ment.[3] We conclude that neither the doctrine of laches nor the expiration of an applicable limitations period presents an obstacle to the plaintiffs' case under the Voting Rights Act. First, the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the multimember structure. Second, there have been significant developments since the 1981 Arkansas reapportionment. The Voting Rights Act was amended in 1982, and the Supreme Court's interpretation of the statute in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), lays down a rather uncompromising structure for the application of the law in vote-dilution cases. Third, we note that the plaintiffs are required to prove that, as a result of the challenged structure, a white majority bloc is usually able to defeat the preferred candidates of the minority. Of course, evidence of this circumstance would be unavailable unless the structure had been in place for some time.

It is suggested that the complaint should be dismissed because indispensable parties have not been joined, those parties being the members of the State Legislature affected by the case. There is no question that they are affected, but we do not believe that they are indispensable in the legal sense. It was open to members of the Legislature to intervene and become parties, if they wished to do so. Both of them have been in the courtroom throughout this case, and one of them testified. In any event, their legal interests have been considered just as fully as if they were parties.

The defendants next contend that the plaintiffs may not

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[3]The defendants have not indicated what they believe is the applicable limitations period. Arkansas law provides that the State shall be reapportioned in the year following each federal census, and that this apportionment is effective unless contested in the State Supreme Court within 30 days. Ark. Const. Art. VIII, §§4, 5. We do not believe this time frame for a special remedy under state law is of consequence under the Voting Rights Act, and the defendants do not so contend.

challenge one district out of the whole state reapportionment plan. Plaintiffs, they say, must either challenge the whole plan or state that they have no objection to any part of it other than District 48-49. This argument, too, is without merit: assuming that there is a State policy that would require a suit filed in State court to challenge the whole plan or not at all, see *Bizzell v. White*, 274 Ark. 511, 625 S.W.2d 528 (1981) (per curiam) (4-3 decision), such a policy would not govern the application of federal law by a federal court. If the plaintiffs are injured by a particular aspect of the plan and are not affected at all by the rest of it, there is no reason why they should not be allowed to challenge the aspect of the plan that affects them.[4] Indeed, they would presumably lack standing under Article III to challenge aspects of the plan (for example, multi-member districts in other parts of the State) that do not affect them at all.[5]

Accordingly, we proceed to discuss the law applicable to the merits of this case.

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[4]The Arkansas Supreme Court's opinion in *Bizzell*, in any case, rests in part on one factor not present here. The challenge made there was to a single Senate District, but if the challenge had been upheld, the boundary lines of that district would have had to be re-drawn, necessarily producing a "ripple effect" on some other districts. No such argument is possible here. Plaintiffs seek relief only within District 48-49. The outer boundaries of that district, which will now become two districts, will not be affected.

[5]Defendants moved for a continuance one week before trial. We denied the motion. Defendants had ample notice of the trial setting, and time was important in getting this case decided during 1988. The main ground of the motion was the need for more time to develop expert testimony. At trial, defendants in fact presented creditable and reputable expert testimony. Their lack of success is due to the legal standard laid down in *Thornburg*. We do not believe that additional time would have enabled defendants to improve their case materially. Their side was well and fully presented, within the rather strict limits of the law.

We also deny plaintiffs' motion for class certification. It was not filed within ninety days of the complaint, as required by E.D. Ark. R. 24. This action makes little if any practical difference.

III.

Section 2 of the Voting Rights Act of 1965, as amended and codified, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

U.S.C. §1973.

Congress amended Section 2 in 1982 to make clear that a violation of the Act may be established by a showing of discriminatory effect stemming from an electoral mechanism; it is not necessary that minority voters prove that the system was adopted or has been maintained for a discriminatory

purpose. *Thornburg*, 106 S. Ct. at 2759; S. Rep. No. 417, 97th Cong., 2d Sess. 28 (hereafter S. Rep.), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205.

In determining whether the Act has been violated, we may consider the following typical factors suggested by the Senate Judiciary Committee Report:

1. the extent of any history of official discrimination in the state or political subdivision that touched on the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07.

Other factors we may consider include whether there is a significant lack of responsiveness to the particularized needs of the minority group and whether the policy underlying the election practice or procedure is tenuous. *Id.*

This Court is required to consider all of the circumstances and applicable factors to answer the ultimate question: "whether[,] 'as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice'." *Thornburg*, 106 S. Ct. at 2763 (quoting S. Rep. at 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206). Plaintiffs are not required to prove the existence of any certain number of the factors listed above, nor are they required to show that a majority of the factors " 'point one way or the other'." *Id.* at 2764 (quoting S. Rep. at 29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207).

We must conduct a "searching practical evaluation of the 'past and present reality'." S. Rep. at 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 208. In the context of vote-dilution cases, this evaluation is shaped by consideration of three circumstances. *First*, the black voters must show that their numbers are sufficiently large and geographically compact to constitute a majority in a single-member district. *Thornburg*, 106 S. Ct. at 2766. *Second*, the plaintiffs must show that the group to which they belong is politically cohesive. *Id.* at 2767. *Third*, the black voters must show that "the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Ibid.* The latter two of these factors may be demonstrated by a showing that voting in the jurisdiction is highly racially polarized. *Id.* at 2769.

With this legal framework in mind, we turn now to the facts developed during the trial of this case.

IV.

A.

The plaintiffs have submitted a proposed plan for division of District 48-49 into two separate districts, in one of which blacks would constitute about sixty-one percent of the voting-age population and sixty-five percent of the overall population. The defendants do not contest the fact that such a district could be created. Accordingly, we find that the black population in District 48-49 is sufficiently large and compact so that a separate district with black voters in the majority could be created. At this time we express no view as to the merit, relative to any other plan that might be developed, of the plan submitted by the plaintiffs.

B.

The plaintiffs have offered the report and testimony of an expert witness, Dr. Allan Lichtman, as to the extent of racially polarized voting in the district and county. The report summarizes a study of nine of the elections involving black candidates in Crittenden County since 1978. Using regression analysis[6] Dr. Lichtman examined contests between black and

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[6]Dr. Lichtman described regression analysis as the "standard method for inferring the behavior of population groups from data collected for political units." Defendants do not dispute this. The role of this statistical methodology in Voting Rights Act cases has been explained in this manner:

> Correlation and regression analysis is used to determine the degree of relationship between two variables, such as the racial composition of the precincts in a city or district and the electoral support provided a particular candidate or group of candidates within those precincts. The independent variable in the analysis is a summary measure of the race of the voters in each precinct (usually the percentage of blacks among the total

white candidates for State Representative from District 48-49 in 1978, 1986, and 1988. He also studied the results from Crittenden County in the 1988 Democratic presidential primary, and mayoral elections in the cities of West Memphis (1982 and 1986) and Earle (1985 and 1986).

Among black voters, the mean level of support for the black candidates in these nine races was eighty-nine percent. The mean level of support among whites for these black candidates was nine percent. Excluding the mayoral contests, the mean level of support for black candidates was ninety-seven percent among black voters; the mean level of support for black candidates among white voters was nine percent.

The levels of support for black candidates by black and white voters in three State Representative races from District 48-49 are of particular interest to the Court. In the 1988 primary election for State Representative, an estimated one hundred percent of black voters supported the black candidate, McGee; ninety-three percent of white voters supported the white candidate, Stockley. In 1986 ninety-five percent of black voters supported the black candidate, and eighty-five percent of white voters supported the white candidate. In 1978 the black candidate collected the votes of ninety-nine percent of black voters and the white candidate got the votes of niney-two percent of white voters.

The evidence also indicates that the Rev. Jesse Jackson,

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[6]*cont'd*

> population, voting age population, or registered voters). The dependent variable is the percentage of voters in each precinct casting ballots for the specific candidate or group of candidates.
>
> . . . Correlation and regression analysis provides statistical coeffecients that summarize the consistency and strength of the relationship between the two variables.

Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Lawyer 369, 374-75 (1985).

the black candidate in the Democratic presidential primary, in 1988 received ninety-four percent of the votes of blacks in the county and five percent of the votes of whites. In races for mayor of West Memphis, the largest city in the district, the black candidate received ninety-six percent of votes cast by blacks in 1986 and an estimated one hundred percent of the votes cast by blacks in 1982. In both of these races, the estimated percentage of whites voting for the black candidate was zero.

Supplementing his regression analysis with extreme-case, or homogeneous-precinct analysis, Dr. Lichtman testified that in precincts with ninety percent or more black population, the black State Representative candidates received ninety-five percent of the vote in 1988, eighty-nine percent of the vote in 1986, and eighty-seven percent in 1978. In precincts that were ninety percent or more white, black candidates received fourteen percent of the vote in 1988, twenty-one percent in 1986, and nine percent in 1978.

Dr. Harold Stanley, the expert witness for the defendants, testified that the figures derived from his own regression analysis of voting returns in Crittenden County were "substantially close" to those collected by Dr. Lichtman for the same elections, those between black and white candidates. Dr. Stanley further testified, however, that focusing only on races involving black candidates against whites does not present an accurate picture of voting in the jurisdiction. Accordingly, the defendants offered evidence indicating that (1) considering most county-wide races and races for mayor in West Memphis and Earle in the last twelve years, blacks and whites most often voted together to elect candidates of their collective choice; and (2) the preferred candidate of black voters most often finished first within the jurisdiction.

Dr. Stanley analyzed sixty-five races between 1976 and 1988 and determined that in fifty-four of these elections the candidate receiving a majority of the votes cast by blacks placed

first in Crittenden County. He also calculated that in all of these elections combined, first-place finishers received sixty-five percent of the vote of blacks; by comparison, fifty-six percent of the votes cast by whites went to the ultimate first-place finisher within the county.

On the basis of this study, Dr. Stanley testified that the overall pattern in Crittenden County is that blacks and whites usually vote together, and the candidates preferred by blacks often place first. The defendants also presented evidence that, in State Representative campaigns between white candidates, a majority of black voters supported the winning candidate on four of five occasions.

The plaintiffs have objected to the admissibility of much of the defendants' evidence, on the grounds of relevance. In particular, they say that only evidence involving races between black and white candidates can be considered. We assume without deciding that all of the evidence offered by the defendants is admissible and properly to be considered. We make this assumption because the result in this case would be the same either way.

First, we believe it is proper to give considerable weight to the evidence of polarization in elections between black and white candidates. In *Thornburg*, the Supreme Court relied heavily on such evidence. 106 S. Ct. at 2771-72. Further, in a functional assessment of the political process, one of the most important factors is the extent to which members of the minority group have been elected to office in the jurisdiction. *Id.* at 2766 n.15. Whether our assessment of the political realities in Crittenden County is expressed in terms of "black candidates" or "candidates preferred by black voters," our conclusion is still that "minority group members prefer certain candidates whom they could elect were it not for the interaction of the [multimember] structure with a white

majority that votes as a significant bloc for different candidates," *id.* at 2776 (opinion of Brennan, J.).

Second, the most probative indication of vote dilution stemming from the multimember structure of the district is the results of the State Representative elections. This case is about a particular electoral structure and its effect on minority participation. Certainly, there is evidence that white candidates preferred by black voters sometimes win in elections involving only whites. The evidence of polarized voting in State Representative elections involving blacks against whites is so strong, however, that it cannot be overcome even when all reasonable inferences are accorded to the evidence of elections involving only white candidates.

The defendants have offered evidence of other reasons, such as incumbency, for the choices made by voters in the district. The materiality of this evidence is questionable. See *Thornburg*, 106 S. Ct. at 2773 (focus of case under Voting Rights Act is difference in choices made by voters, not reasons for this difference) (opinion of Brennan, J.). In any event, we assume for present purposes that this evidence may have some bearing on whether the particular election results on which we focus stem from the multimember structure of the district. We find this evidence insufficient to compel a different result in this case, given the sharp polarization in races involving black candidates for State Representative. Nor are we persuaded by evidence of some success by black candidates in school-board elections or other local races, because the electoral structure at issue here has no effect on these candidates.

We find, therefore, that there is racially polarized voting in the district, despite the fact that blacks and whites often pefer the same candidate in races involving only whites. The purpose of our inquiry into polarized voting is twofold: "to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote

sufficiently as a bloc usually to defeat the minority's preferred candidates." *Id.* at 2769. Upon consideration of all the evidence offered by both parties, we find that there is racially polarized voting in Crittenden County and District 48-49; black voters usually vote cohesively, as a unit; and white voters have the strength under the present multimember structure to enable them to frustrate the choices made by black voters.

C.

We make the following additional findings:

(1) The Court takes judicial notice that there is a history of racial discrimination in the electoral process in Arkansas. See *Perkins v. City of West Helena*, 675 F.2d 201, 211 (8th Cir.), *aff'd mem.*, 459 U.S. 801 (1982). We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.

(2) We further find that the history of discrimination has adversely affected opportunities for black citizens in health, education, and employment.[7] The hangover from this history necessarily inhibits full participation in the political process.

(3) State law has no provision forbidding "bullet" or "single-shot" voting, but the effectiveness of any such practice

[7]The plaintiffs' evidence shows, for example, that the per capita income of blacks in the county was $2,293 according to the 1980 census, about one-third that of white residents. In 1980, 58.6% of blacks in the county had income below the poverty level (and 10.7% of whites); 19.6% of blacks over 25 were high school graduates (and 61.4% of whites); and the median value of homes owned by blacks was $16,700 (and $39,200 for whites). "[C]ourts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Thornburg*, 106 S. Ct. at 2776 (citations omitted) (opinion of Brennan, J.).

would be negated by the requirement that candidates run for designated seats. Arkansas law requires candidates for state representative to secure a majority of votes in a primary election in order to become the party nominee. This district does not seem to us unusually large, as multimember districts go. There is no subdistrict residency requirement. No evidence as to any slating process has been presented.

(4) The plaintiffs have offered no evidence of discriminatory intent in the formation of District 48-49, and we necessarily find on this record that there was no such intent. Plaintiffs have not proved a claim under the Constitution.

(5) Neither side has presented convincing evidence about the voter-registration rates of the respective races.

(6) The plaintiffs have not attempted to demonstrate lack of responsiveness to the needs of black citizens on the part of officials in the district. The defendants have presented evidence which indicates that county officials have been responsive to some of the concerns particular to blacks and have made attempts to make the political process accessible to blacks. Accordingly, we find no present lack of responsiveness to the needs of blacks has been shown. State policy with respect to multimember districts (26 members of the House chosen from such districts, and no Senators) is not tenuous, but neither is it especially strong.

(7) The evidence does not indicate that overt or subtle racial appeals have been made.

V.

The Supreme Court has held that the most important factors in a Voting Rights Act challenge to a multimember district are racial polarization in voting and whether minority-

group members have won elections in the jurisdiction in question — here, District 48-49. *Thornburg*, 106 S. Ct. at 2766 n.15. Other factors listed in the Senate Report, if present, "are supportive of, but *not essential to*, a minority voter's claim." *Ibid.* (emphasis in original). Plaintiffs have presented strong, perhaps overwhelming, proof of the essential elements of their claim. Some of the other factors favor plaintiffs, some do not, and some are just not in the case. On balance, we find that the multimember configuration of District 48-49 deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice. So long as the present situation is allowed to continue, there will probably never be a black State Representative from Crittenden County, even though, as detailed above, black citizens are numerous enough to have a clear majority in a single-member district. Candidates favored by blacks can win, but only if the candidates are white.

Accordingly, the result of the March 8, 1988, primary election for State Representative in District 48-49 is hereby set aside. Defendants are restrained and enjoined from certifying the winners of that primary as party nominees. The defendant members of the State Board of Apportionment and the plaintiffs are ordered to submit proposed plans for separate Districts 48 and 49 on or before May 27, 1988.[8] This Court will convene on June 6, 1988, to consider these plans.

It is so ordered.

A true copy.

Attest:

/s/ Carl R. Brents
Clerk, U.S. District Court, Eastern District of Arkansas.

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[8]An order to this effect was entered on May 2, 1988. At trial counsel for defendants stated that ten days would be enough time for them to prepare a plan.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

PER CURIAM.

The motion of defendants to dismiss for failure to state a

claim or, in the alternative, for a new trial, is denied for the reasons stated in open court at the hearing on June 6, 1988.

Having heard evidence and arguments of counsel, the Court adopts and approves the districting plan submitted by plaintiffs, which was introduced in evidence at the hearing on June 6 as Plaintiff's Exhibit 1R.

Counsel for plaintiffs is directed to submit a proposed form of final judgment on or before June 16, 1988, and defendants may have to and including June 23, 1988, to object to or comment on the form.

It is so ordered this 6th day of June, 1988.

FOR THE COURT:
/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated..... *Plaintiffs*

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Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

ARNOLD, Circuit Judge.

On July 1, 1988, this Court entered its final judgment in

this vote-dilution case under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. This opinion explains our reasons for the particular form of judgment we have entered.

We had previously held that plaintiffs, black registered voters in Crittenden County, Arkansas, had demonstrated that at-large election of State Representatives from dual-member District 48-49 denied them an equal opportunity to participate in the political process. We ordered that the March 8, 1988, primary election for State Representatives be set aside, and that a plan to divide District 48-49 into separte districts be implemented in time for a special primary election to be held before the November 1988 general election. ___ F. Supp. ___ (E.D. Ark. 1988).

Following this decision, we gave the parties an opportunity to submit their proposals for dividing the District into two similarly sized, contiguous districts. Only the plaintiffs submitted a plan. Our judgment has accepted this proposed plan and ordered it into effect, even though the defendants objected to the high percentage of black voters in the new District 48. We have done so because there is convincing authority that historically disadvantaged minorities require more than a simple majority in a voting district in order to have the Voting Rights Act remedy to which they are entitled — a practical opportunity to elect candidates of their choice.

Under the plaintiffs' proposed remedy, District 48 will have a total population of 23,066, with black residents making up 14,975 of this number (about 65%). District 49 will have 22,861 in total population, with white residents accounting for 18,567 (81%). In terms of voting-age population, blacks will make up 60.55% of the residents in District 48, representing 8,470 persons out of 13,989. The percentage of blacks of voting age will be less than 16% in District 49, where whites make up 13,008 of the 15,497 people old enough to register to vote.

Not only have the defendants declined to submit a plan of their own, but they have chosen not to say whether, given the desired balance of size and population between the districts, it is feasible to create a district that they would find preferable. They simply maintain that any plan affecting only District 48-49 would interfere with the statewide scheme of apportionment. We rejected this argument as a defense to the plaintiffs' case on the merits, and we do not accept it here as a reason to disapprove the plaintiffs' plan. Defendants also argue that plaintiffs' evidence fails to justify what they call a "supermajority" black district.

We recognize that this Court has an independent obligation to order a remedy that is appropriate to the violation that has been shown. Accordingly, we have carefully examined plaintiffs' plan to see whether it complies with principles of equity and efficacy established by cases under the Voting Rights Act.

In shaping a remedy under the Voting Rights Act, this Court must "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 208 (footnote omitted). It is widely understood that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Moreover, the extent to which minorities must outnumber whites in the relevant jurisdiction is a matter of "general acceptance in redistricting jurisprudence." *Id.* at 1415-16 (citing cases).

A guideline of 65% of total population is frequently used,

and is derived by supplementing a simple majority with an additional 5% to offset the fact that minority population tends to be younger than that of whites, 5% for the well-documented pattern of low voter registration, and 5% for low voter turnout among minorities. When voting-age population figures are used, a 60% nonwhite majority is appropriate. *Id.*[1]

Defendants suggest that there is no basis for correctives in this case because there was no convincing evidence before the Court of low registration or participation among blacks in Crittenden County. We think this Court is entitled to consider the "generally . . . lower voter registration and turnout characteristics" of minorities, *Ketchum*, 740 F.2d at 1413,[2] especially when there is nothing to indicate that the general pattern does not apply in Crittenden County, and the factors underlying this pattern exist in great measure in the county.[3]

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[1]We are aware that one reason for the 65%-of-total-population-guideline in *Ketchum* is that the case involved a form of Voting Rights Act violation called retrogression, in which there is a decrease in the absolute number of representatives a minority group may expect to elect, 740 F.2d at 1402, and the appellate court thought it equitable to restore blacks to majority percentages approaching those they had before redistricting took place. We do not think this circumstance renders the reasoning of the case inapplicable, because the Court's stated objective was to give the plaintiffs an effective majority in the relevant districts. *Id.* at 1419.

[2]The Seventh Circuit referred to national voter registration and turnout statistics from the 1980 census to illustrate this circumstance. *Ketchum*, 740 F.2d at 1413 n.16.

[3]We think it is reasonable to infer lower registration and participation when, for example, in 1980 fewer than 20% of blacks in Crittenden County over the age of 25 were high school graduates, and almost 60% of blacks in the county lived below the poverty level. The percentages for whites were 61.4% high school graduates and 10.7% below the poverty level. Plaintiffs' Exhibit 2. *See Ketchum*, 740 F.2d at 1413-14 (some of the voter problems stem from low income, low economic status, high unemployment, poor education and high mobility).

When reliable voting statistics are not available, "judicial experience can provide a reliable guide to action." *Id.* at 1415. A district court may base its remedy on data in the record or use a "uniform corrective." *Id.* at 1419. Further, as plaintiffs point out, the defendants' summary of voting patterns entered in evidence at trial shows that black turnout as a percentage of total black population was lower than that of whites in every one of the sixty-five contests analyzed, by an average of nine percent. Def. Exhibit 7.

Accordingly, we believe a corrective majority in black voting age population is in order. We adopt the plan proposed by the plaintiffs, which will result in District 48's having a majority black population of 60.55% among residents of voting age. This will give blacks a fair opportunity to elect the candidate of their choice to the Arkansas House of Representatives, and help to eradicate the effect of the dual-member, at-large system on participation by blacks in the political process.

FOR THE COURT:

/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

JUDGMENT

This Court having filed its opinion on the merits of this

case on May 16, 1988; an evidentiary hearing with respect to the remedy having been held on June 6, 1988; the Court having announced from the bench at the conclusion of that hearing its decision to adopt the remedial plan proposed by plaintiffs; plaintiffs having submitted a proposed form of final judgment; defendants having submitted their comments with respect to this form; and the Court being well and sufficiently advised in the premises;

It is now therefore by the Court CONSIDERED, ORDERED, ADJUDGED, AND DECREED:

1. That the multimember district for electing members of the Arkansas House of Representatives from District 48-49 be, and it is hereby, declared to be in violation of §2 of the Voting Rights Act, 42 U.S.C. §1973, and that defendants therefore be, and they are hereby, restrained and enjoined from conducting any further elections for seats in the Arkansas House of Representatives from that legislative district.

2. That the March 8, 1988, party primary from the multimember district, District 48-49, be, and it is hereby, declared null and void, insofar as it relates to the race for the Arkansas House of Representatives.

3. In order to remedy the violation of §2 of the Voting Rights Act, the Court hereby adopts the proposed single-member redistricting plan presented by the plaintiffs. This plan is described in exhibit 1 attached to this order, which is incorporated herein by reference. The Court finds that the plan complies with the one-person, one-vote principle of the Fourteenth Amendment and is necessary to cure the dilution of black voting strength caused by the existence of the prior multimember District 48-49. The Court adopts this plan after having given both the plaintiffs and the defendants an adequate opportunity to submit proposed remedial redistricting plans, and after holding a hearing on June 6, 1988, to

consider the question of an appropriate remedy. Defendants did not submit a proposed plan. Nor did they offer any additional evidence at the June 6, 1988, hearing. They chose instead to rely on the evidence already submitted during the April 25-26, 1988, hearing held on the liability phase of this suit.

4. At the June 6, 1988, hearing, the Court indicated its intention to order a special primary election under the court-adopted single-member redistricting plan so that nominees could be chosen in time for the regularly scheduled November 8, 1988, general election. The Court asked the defendants which dates would be preferable, and the defendants suggested September 13, 1988, for the first primary election and September 27, 1988, for any primary run-off, should a run-off be necessary. The plaintiffs concurred in those dates. A review of Act 969 of 1987, codified as Ark. Code Ann. §6-14-102 (1987), however, reveals that the annual school elections will be held in each school district of the state on the third Tuesday in September, which will be September 20, 1988. Accordingly, the defendants, their agents, servants, employees, and all persons working in concert with them, are directed to hold a special primary election for state representatives from the districts established by this judgment on September 20, 1988, and a primary run-off, should one be necessary, on October 4, 1988.

5. The Court adopts a candidate qualifying period in conformity with the provisions of the laws of the State of Arkansas, which require that the candidate qualifying period be left open for 14 days, and that the period close 40 days prior to the election. Accordingly, the candidate qualifying dates of July 28 through August 11 shall be adopted by the defendants, their agents, servants, employees, and all persons working in concert with them, for the conduct and operation of the special primary election or elections required by this judgment.

6. In accordance with Rule 19(a) of the Federal Rules of

Civil Procedure, the following parties are added as defendants in order to effectuate the relief mandated by this order and judgment: the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members. At such time as these defendants are duly served with process and have had an opportunity to be heard, the Court shall determine what relief, if any, is necessary or appropriate with respect to them.

7. The Court reiterates its holding that this case concerns only legislative District 48-49.

8. The Court retains jurisdiction for the purposes of enforcing this decree, and for such other purposes as may be necessary. In addition, the managing judge of this case shall retain jurisdiction in order to consider any application for attorneys' fees and costs.

9. The Clerk is directed to enter this judgment in the manner described in Fed. R. Civ. P. 79(a).

It is so ordered this 1st day of July, 1988.

FOR THE COURT:

/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, et al ..... *Plaintiffs*

V. NO. LR-C-88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party; the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members ..... *Defendants*

JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, pursuant to Supreme Court Rule 10.3, Bill Clinton, Bill McCuen, Steve Clark, Lilburn W. Carlisle, Tommye S. Givens, the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden

County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members, above named defendants, hereby jointly appeal to the Supreme Court of the United States from the final judgment entered by the three-judge court in this action on July 1, 1988.

This appeal is taken pursuant to Title 28, U.S.C. §1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank J. Wills, III, Assistant Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to Reginald Robertson, East Arkansas Legal Services, 402 Franklin, Helena, Arkansas 72342; Ben Thomas Cole, II, East Arkansas Legal Services, P. O. Box 1149, West Memphis, Arkansas 72301; Victor Hill, East Arkansas Legal Services, 114 E. Main, Blytheville, Arkansas 72315; John Walker, 1723 Broadway, Little Rock, Arkansas 72206; and to Robert B. McDuff, William L. Robinson, Frank R. Parker, Samuel Issacharoff, Lawyers Committee for Civil Rights Under Law, 1400 "I" Street, N.W., Suite 400, Washington, D.C. 20005, on this 29th day of July, 1988.

/s/ Frank J. Wills, III

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

ELBERT SMITH, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

---

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	4
I. NOTHING WAS IMPROPER ABOUT THE DISTRICT COURT'S CONSIDERATION OF A CHALLENGE TO ONLY ONE LEGISLATIVE DISTRICT RATHER THAN THE ENTIRE STATEWIDE REDISTRICTING PLAN	5
II. THE ISSUE OF THE DISTRICT COURT'S DENIAL OF A CONTINUANCE IS NOT DESERVING OF FURTHER ATTENTION FROM THE COURT	6
III. IN ANALYZING VOTING PATTERNS, THE DISTRICT COURT PROPERLY ADMITTED AND CONSIDERED EVIDENCE OF ALL ELECTIONS PRESENTED BY THE APPELLANTS AND BASED ITS ULTIMATE FINDING OF DILUTION ON MORE THAN EVIDENCE OF POLARIZED VOTING AND THE HISTORICAL ABSENCE OF BLACK LEGISLATORS FROM THE DISTRICT AT ISSUE	7
IV. THE APPELLANTS WAIVED THEIR RIGHT TO APPEAL THE DISTRICT COURT'S ACTION VOIDING THE MARCH 8, 1988 PRIMARY ELECTION AND ORDERING A SPECIAL PRIMARY ELECTION ON SEPTEMBER 20, 1988	9

V. THE ISSUE OF WHETHER THE DISTRICT COURT PROPERLY ADDED ADDITIONAL DEFENDANTS IN ORDER TO EFFECTUATE ITS JUDGMENT WAS NOT PRESERVED BELOW AND IS NOT DESERVING OF FURTHER ATTENTION FROM THIS COURT 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases Page

Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988) 8
Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987) 8
Collins v. City of Norfolk, 679 F.Supp. 557 (E.D. Va. 1988), *appeal pending*, No. 88-3950 (4th Cir.) 8
Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987) 8
Connor v. Finch, 431 U.S. 407 (1977) 11
East Jefferson Coalition v. Parish of Jefferson, 691 F.Supp. 991 (E.D. La. 1988) 8
Martin v. Allain, 658 F.Supp. 1183 (S.D. Miss. 1987) 8
McNeil v. City of Springfield, 658 F.Supp. 1015 (C.D. Ill. 1987) 8
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
White v. Regester, 412 U.S. 755 (1973) 5, 6

Other Authorities

S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-554

BILL CLINTON, GOVERNOR OF ARKANSAS, *et al.*,
Appellants,

v.

ELBERT SMITH, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

---

MOTION TO AFFIRM

Appellees move the Court pursuant to Sup. Ct. Rule 16 to affirm the judgment below on the ground that the questions presented in the jurisdictional statement are so insubstantial as not to require further argument.

OPINIONS BELOW

The opinion of the three-judge district court finding a violation of Section 2 of the Voting Rights Act (J.S. App. A) is reported at 687 F.Supp. 1310 (E.D. Ark. 1988). The district court's opinion on the remedy issue (J.S. App. C) is reported at 687 F.Supp. 1361 (E.D. Ark. 1988).

STATEMENT OF THE CASE

This case was brought by eleven black voters of Arkansas House District 48-49, which is located entirely within Crittenden County, Arkansas, alleging that the at-large election of two members of the Arkansas House of Representatives from the district unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The plaintiffs initially moved for a preliminary injunction to block the March 8, 1988 party primary for the district's two seats, but the three-judge district court denied the motion, in large part because of its view that any harm could be rectified by setting the primary election aside after a trial on the merits. *Smith v. Clinton*, 687 F.Supp. 1310, 1312 (E.D. Ark. 1988) (three-judge court) (J.S. App. A-4).[1]

A trial on the merits was held on April 25 and 26, 1988. At the conclusion of the trial, the district court announced from the bench its finding of a violation of Section 2, and also announced that it was setting aside the results of the March 8 primary. On May 16, 1988, the court issued a written opinion explaining the reasons for finding the Section 2 violation. Following this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court found (1) that black citizens in District 48-49 are sufficiently numerous and geographically compact to constitute a majority in a single-member district, (2) that black voters are politically cohesive, and (3) that the white majority votes sufficiently as a bloc usually to defeat the candidates of choice of black voters. 687 F.Supp. at 1315-1317; J.S. App. A-10-A-15. House District 48-49 is 42 percent black in population and 37 percent black in voting age population. *Id.* at 1312; J.S. App. A-3. After noting that black voters

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[1] The appellants are simply wrong when they say the preliminary injunction was denied because of "laches." J.S. 4.

generally support black candidates, and in light of evidence that no black citizen in the twentieth century has been elected to the legislature from Crittenden County or District 48-49, the district court found that "[s]o long as the present situation is allowed to continue, there will probably never be a black State Representative from Crittenden County. . . ." 687 F.Supp. at 1318; J.S. App. A-17.

In addition, the district court found a history of discrimination and a legacy of socioeconomic disparities which inhibit the political opportunities of black citizens in Crittenden County, as well as the use of numbered posts, the use of a majority vote requirement in party primaries, and the absence of a subdistrict residency requirement that enhance the dilution of black voting strength in at-large voting. 687 F.Supp. at 1317-1318; J.S. App. A-15 - A-16. Considering all of these factors within the context of the totality of the circumstances in Crittenden County, the district court concluded "that the multimember configuration of District 48-49 deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice." 687 F.Supp. at 1318, J.S. App. A-17.[2]

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[2] The appellants wrongly suggest that the district court considered one of the "essential elements" of plaintiffs' Section 2 claim to be that black citizens have not won elections in proportion to their percentage in the population. J.S. 5. Instead, the district court simply followed this Court's lead in *Thornburg v. Gingles*, 478 U.S. at 48 n.15, by looking at the extent to which minority group members have won elections in the jurisdiction in question, without requiring any type of proportional representation. 687 F. Supp. at 1315-1318; J.S. App. A-13, A-16 - A-17.

In addition, the district court rejected the validity of the evidence which the appellants mention at J.S. 6, and by which they attempted to prove that black citizens register to vote in higher proportions than white citizens in Crittenden County. Instead, the district court held that no convincing evidence had been introduced regarding the relative voter registration rates of whites and blacks. 687 F. Supp. at 1318; J.S. App. A-16.

The district court then invited all parties to submit proposed remedial plans. Defendants chose not to submit any remedial plans, and the only proposal before the court was one presented by the plaintiffs which divided the district into two single-member districts, one majority black and one majority white. After an evidentiary hearing, the district court adopted the plan proposed by the plaintiffs, setting out its reasons in an opinion dated July 7, 1988. *Smith v. Clinton*, 687 F.Supp. 1361 (E.D. Ark. 1988) (three-judge court); J.S. App. C. Contrary to the assertion of the appellants that the court relied only upon "national data" in ordering this plan into effect, J.S. 7, the district court held the plan to be a proper remedy after analyzing voting patterns and socioeconomic disparities in Crittenden County, including evidence that black voters participate at lower rates than whites as a result of socioeconomic deprivation. 687 F.Supp. at 1363; J.S. App. C-4 - C-5. In addition, the district court noted that the appellants had chosen not to say whether it was feasible to design a plan they felt would be preferable to that adopted by the district court. 687 F.Supp. at 1362; J.S. App. C-3.

ARGUMENT

This case is a routine, run-of-the-mill Section 2 at-large election challenge well within the ambit of this Court's controlling decision in *Thornburg v. Gingles* that fails to present any substantial questions that require plenary consideration by this Court. The questions presented (J.S., pp. i-ii) concerning challenging at-large elections in only one district, the district court's denial of a continuance, and the adding of additional defendants to grant full relief are so insubstantial that they are merely listed, but not discussed by appellants in their jurisdictional statement (J.S. 11). On the issue of which elections to look at to determine racially polarized voting, appellants are wrong when they assert that the district court limited its analysis to black-white contests. The

district court admitted and considered all the statistical evidence presented by both plaintiffs and defendants concerning both black-white contests *and* elections in which only white candidates ran (687 F.Supp. at 1316; J.S. App. A13). But in the context of this case the trial court determined that the evidence of polarization in black-white contests was so strong that it overcame all reasonable inferences from elections in which only whites ran for office (687 F.Supp. at 1317; J.S. App. A-14). Further, appellants are estopped from challenging the district court's decision to re-run the party primary election on the basis of single-member districts since that was a solution they themselves suggested in opposing appellees' preliminary injunction motion and is a form of relief that is well within the discretion of the district court.

Each of the issues raised by the appellants will be discussed in the order presented in the list of "questions presented" in the jurisdictional statement. In considering whether any of these issues merit further argument, and whether the district court should be reversed—as appellants suggest—it is important to remember that the district court's findings rest upon the district court's "intensely local appraisal" (*Thornburg*, 478 U.S. at 78, *quoting White v. Regester*, 412 U.S. 755, 769-70 (1973)) of the impact of at-large voting and that the district court's ultimate finding of dilution is a finding of fact which should not be reversed unless clearly erroneous. *Thornburg v. Gingles*, 478 U.S. at 78-79.

I. NOTHING WAS IMPROPER ABOUT THE DISTRICT COURT'S CONSIDERATION OF A CHALLENGE TO ONLY ONE LEGISLATIVE DISTRICT RATHER THAN THE ENTIRE STATEWIDE REDISTRICTING PLAN.

The appellants do not present any discussion of this issue in their jurisdictional statement. It is not a substantial issue, inasmuch as courts frequently find that

only particular districts within a given redistricting scheme dilute black voting strength. *See Thornburg v. Gingles*, 478 U.S. at 35 (noting that the case challenged only seven of North Carolina's legislative districts); *White v. Regester*, 412 U.S. 755, 759, 765 (1973) (findings of racial vote dilution in the Texas legislative districting plan limited to two counties). Indeed, as this Court pointed out in *Gingles*, vote dilution analysis in a case under Section 2 should proceed on a "district-specific" basis. 478 U.S. at 59 n.28. Finally, as the district court noted, the plaintiffs may lack standing to challenge legislative districts in other parts of the state. 687 F.Supp. at 1313; J.S. App. A-6. For all of these reasons, the district court properly considered the challenge to one legislative district without requiring the plaintiffs to include within their lawsuit all of the legislative districts in the state.

II. THE ISSUE OF THE DISTRICT COURT'S DENIAL OF A CONTINUANCE IS NOT DESERVING OF FURTHER ATTENTION FROM THE COURT.

The appellants fail to allege in their jurisdictional statement any prejudice from the denial of their motion for a continuance of the scheduled trial date. Indeed, no discussion of this issue is contained in the text of the jurisdictional statement. Appellants' expert witness on voting statistics gave extensive testimony which was admitted in evidence by the trial court (687 F.Supp. at 1316; J.S. App. A-12 - A-13). The grant or denial of a continuance is within the discretion of the district court, and the issue is so frivolous as to require no further argument.

III. IN ANALYZING VOTING PATTERNS, THE DISTRICT COURT PROPERLY ADMITTED AND CONSIDERED EVIDENCE OF ALL ELECTIONS PRESENTED BY THE APPELLANTS AND BASED ITS ULTIMATE FINDING OF DILUTION ON MORE THAN EVIDENCE OF POLARIZED VOTING AND THE HISTORICAL ABSENCE OF BLACK LEGISLATORS FROM THE DISTRICT AT ISSUE.

In listing the "questions presented" in their jurisdictional statement, the appellants describe the third issue as follows: "Whether the court below improperly based its finding . . . solely upon evidence of racially polarized voting in eight black versus white elections and upon the fact that no black had previously won a seat in the Arkansas House of Representatives from the district in issue." This appears to encompass two separate contentions: first, that the district court failed to consider evidence of voting patterns in elections involving white candidates only, and second, that the district court's ultimate conclusion was based only on evidence of polarized voting and the absence of black legislators. These are addressed in order.

With respect to the first, it is simply incorrect to suggest that the district court failed to consider evidence of elections involving only white candidates. The district court clearly acted on the assumption that all such evidence was admissible and explicitly considered this evidence in finding the existence of polarized voting. 687 F.Supp. at 1316-1317; J.S. App. A-13 - A-15. To the extent the district court emphasized the importance of the patterns of racial bloc voting in elections with both white and black candidates, it was doing nothing more than following this Court's decision in *Thornburg v. Gingles* in which the Court affirmed findings of racially polarized voting based on black versus white candidate election contests. 478 U.S. at 52, 80-82. There is no conflict among the circuits or among the lower courts on this

issue. Every court presented with this issue also has relied heavily upon the voting patterns in elections involving both white and black candidates. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-504 (5th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987); *McNeil v. City of Springfield*, 658 F.Supp. 1015, 1030 (C.D. Ill. 1987); *East Jefferson Coalition v. Parish of Jefferson*, 691 F.Supp. 991, 1000-1001 (E.D. La. 1988).[3] If the appellants were to have their way, and this Court were to reverse the district court's finding of dilution because black voters (along with white voters) occasionally supported the winning candidate in white versus white elections in Crittenden County, this Court would be permitting the continuation of an electoral system in which, as the district court put it, "[c]andidates favored by blacks can win, but only if the candidates are white." 687 F.Supp. at 1318; J.S. App. A-17.

The second part of this issue—the contention that the district court's ultimate conclusion was improperly based on nothing more than findings of polarized voting and the absence of black representatives from the challenged district—is not even discussed in the textual portion of the jurisdictional statement. Moreover, it is demonstrably in-

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[3] The district court's decision in *Collins v. City of Norfolk*, 679 F. Supp. 557 (E.D. Va. 1988), *appeal pending*, No. 88-3950 (4th Cir.), cited by the appellants, J.S. 10, is not to the contrary inasmuch as the *Collins* court never confronted this issue. The issue in that case was not whether the election results in elections in which only white candidates were running disproved legally significant bloc voting, but whether elections in which both black and white candidates were running could count as a minority electoral success when black candidates who were preferred by high percentages of the black vote were defeated by white candidates who received black majorities but lower black vote percentages. See *Collins v. City of Norfolk*, 816 F.2d 932, 937 (4th Cir. 1987).

correct. In addition to finding polarized voting and an absence of black elected officials, the district court also found that black citizens can form a majority in a single-member district and that they are electorally disadvantaged by a history of discrimination, socioeconomic disparities, numbered posts which operate as anti-single-shot voting devices, a majority vote requirement in party primaries, and the absence of a subdistrict residence requirement. 687 F.Supp. at 1315-1318; J.S. App. A-15-A-16.[4] The district court specifically stated that it was considering all of the relevant evidentiary circumstances in reaching its conclusion. 687 F.Supp. at 1314, 1318; J.S. App. A-9, A-15 - A-17.

IV. THE APPELLANTS WAIVED THEIR RIGHT TO APPEAL THE DISTRICT COURT'S ACTION VOIDING THE MARCH 8, 1988 PRIMARY ELECTION AND ORDERING A SPECIAL PRIMARY ELECTION ON SEPTEMBER 20, 1988.

On February 16, 1988, the district court held a hearing on plaintiffs' motion for preliminary injunction at which the plaintiffs urged that the upcoming March 8, 1988 party primary be postponed pending a trial on the merits. The defendants, who are appellants in this Court, opposed that motion and during the course of the hearing stated to the district court that, if it let the election go forward and later ruled for the plaintiffs on the merits, it then could set the primary aside and hold a special primary election:

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[4] Indeed, the appellants' attorneys seem a bit confused. In the "questions presented," they say the district court's finding of a Section 2 violation was based "solely" on polarized voting and the absence of black elected officials. At page 11 of the jurisdictional statement, however, when again listing the issues, they state that the question is whether the district court's conclusion was improperly based on polarized voting and the depressed socioeconomic status of black citizens.

> [Mr. Rubens, attorney for the defendants]: We would further expect the proof to show that the plaintiffs have got to show irreparable harm. We submit that the proof will show that the plaintiffs are voters in this case and that if the Court ultimately grants the relief that is sought the voters will again be allowed to go to the polls. And, therefore, we do not think that there will be irreparable harm.
>
> JUDGE ARNOLD: Are you suggesting, Mr. Rubens, that if we deny the preliminary relief and the election took place, the primary took place, and then there was a trial on the merits and we held for the plaintiffs and this took place sometime before November that we would then void the March 8 primary and direct a new primary?
>
> MR. RUBENS: Your Honor, I believe that is a possibility. I believe it was discussed in *Halifax versus Johnson*, and I am bad for case citations, Your Honor, but in one of the cases in our brief we pointed out to the Court that there are instances where the Court even finds that plaintiffs are likely to succeed on the merits but because of the untimeliness and the harm to the public at large of cancelling an election the Court goes ahead and just does that and then says we'll deal with that problem when we get to it. And that, yes. So I guess to answer the Court directly, yes, sir, I am.
>
> JUDGE ARNOLD: All right.

Transcript of February 16, 1988 hearing, pp. 11-12. The district court followed the exact path suggested by counsel for the defendants-appellants. Having urged it upon the district court, the appellants have waived any right to appeal the district court's action in that respect.

Indeed, at no time after the trial on the merits or during the remedial proceedings did the appellants preserve this issue in the district court by objecting to the setting aside of the primary or the ordering of the

special election (except to the extent they objected to any relief because they contended they should have prevailed on the merits). The only time such an objection was lodged was in the post-judgment motion to the district court asking that court to stay its judgment—at which time it was far too late to raise a new issue and preserve it for appeal.

Finally, even if the issue had been preserved, the fashioning of a remedy—including the setting aside of an election and the ordering of a special election—is within the discretion of the district court. *See Connor v. Finch*, 431 U.S. 407, 414 (1977). Had the district court failed to do what it did, it would have been two years before the violation could be remedied at the next regular election. Instead, the district court fully complied with the intent of Congress in enacting the 1982 amendment to Section 2 that once a violation was found, full relief should be granted:

> The court should exercise its traditional equitable powers to fashion the relief so that it *completely remedies* the prior dilution of minority voting strength and *fully provides* equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 208 (emphasis added, footnote omitted).

Clearly, the district court's action was within its remedial discretion, and need not be the subject of further argument before this Court.

V. THE ISSUE OF WHETHER THE DISTRICT COURT PROPERLY ADDED ADDITIONAL DEFENDANTS IN ORDER TO EFFECTUATE ITS JUDGMENT WAS NOT PRESERVED BELOW AND IS NOT DESERVING OF FURTHER ATTENTION FROM THIS COURT.

Nowhere in the text of the jurisdictional statement do appellants even discuss this issue, much less explain why they think the district court was in error, why they were prejudiced by the district court's action, or why they think the issue is worthy of review by this Court. At no time in the district court did the appellants object to the addition of certain defendants in order to effectuate the district court's judgment. That type of action is within the discretion of the district court and should not occupy further argument before this Court.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the final judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX EXHIBITS

1.	Decision of three judge District Court	A-1
2.	Decision of Burke County Superior Court	A-26
3.	Notice of Appeal	A-50
4.	O.C.G.A. 21-3-125	A-52
5.	Burke County Superior Court Election Contest Order	A-58

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EMMA GRESHAM, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
vs.	)	1:87-CV-867-JOF
JOE FRANK HARRIS,	)	
et al.,	)	
Defendants.	)	

ORDER

This action under the Voting Rights Act is before the three-judge court on the plaintiff's motion for a permanent injunction. The plaintiffs seek to extend this court's preliminary injunction, which enjoined the defendants from impelementing

any voting changes directed by the Burke County Superior Court in its December 30, 1987 order absent preclearance under section 5 of the Voting Rights Act. For the reasons discussed below, the plaintiff's motion for a permanent injunction will be granted.

I. FACTS AND PROCEDURAL HISTORY.

The following facts were stipulated by the parties at the January 14, 1988 hearing before the three-judge court.

1. The plaintiffs are black registered voters and residents of Burke County, Georgia.

2. The town of Keysville was incorporated in 1890 pursuant to Georgia Law 1890-91, Volume II, p. 657.

3. The boundaries of Keysville were fixed by the Legislature and extend "one-half mile in every direction from the schoolhouse which is now located in said town of Keysville." Id. The boundaries of the town have never been changed subsequent

to their designation in the original act of incorporation by legislative act or municipal annexation.

4. The schoolhouse referred to in the 1890 Georgia law was destroyed and its exact location is in dispute.

5. There are approximately 165 registered voters in the town of Keysville (as defined by the boundaries used by Burke County officials for the January 4, 1988 elections), of whom the majority are black.

6. Pursuant to its act of incorporation the municipal government of Keysville consists of a mayor and five council members elected on the first Monday in January 1891 and on the same day annually thereafter for one-year terms of office.

7. Keysville is a current municipality of the State of Georgia. However, until January 4, 1988 there had been no elections

for the mayor and council and no municipal office holders since approximately 1933.

8. For several years the plaintiffs and other black residents of Keysville tried to reactivate the municipal government of Keysville and elect a mayor and council.

9. In 1985, the Burke County attorney, on behalf of Keysville residents, requested the State Attorney General to advise him how to reactivate the municipal government. The Attorney General responded by letter dated August 2, 1985.

10. The Georgia Municipal Election Code, O.C.G.A. Section 21-3-408(b), provides that in the event of a vacancy in any municipal office, and if, as in Keysville, the municipal charter fails to provide a method for the filling of such vacancy, "the governing authority shall thereupon call a special election to fill such vacancy."

11. All municipal elections are

conducted by "the superintendent, registrars, deputy registrars, poll officials and other employees" selected by the governing authority. O.C.G.A. Section 21-3-8(3).

12. Since the offices of the governing authority for Keysville were vacant, and pursuant to the advice of the Attorney General, the plaintiffs and other residents of Keysville conducted a town meeting on September 5, 1985, after which plaintiff Turetha Neely and Upton Cochran were given an oath of office as punitive co-superintendents of election by the probate judge of Burke County, and called a special election for the mayor and council for January 6, 1986.

13. Plaintiff Emma Gresham qualified for mayor and plaintiffs Clayton Neely, Jr., Anfield, Wright, Streetman, and Earl M. Neely qualified for the council. None of

these candidates had any opposition and, after the closing of the qualifying time but before the scheduled election, all were declared elected and were administered the oath of office by the probate judge on December 30, 1985.

14. On the same day, five white citizens of Keysville, who are the intervenors in this case, sought and were granted a temporary restraining order by the Superior Court of Burke County enjoining plaintiff Turetha Neely, the Board of Registrars of Burke County, and others from holding the elections on January 6, 1986 on the grounds that the elections were not being held in conformity with state law.

15. On January 17, 1986, the superior court issued a preliminary injunction enjoining the scheduling or conducting of any municipal election for Keysville until all the requirements of state law were met.

16. It was not possible for elections for the mayor and council to be conducted in literal conformity with the Georgia Municipal Election Code since the offices of the governing authority, which has the duty of calling elections and selecting election officials, were vacant.

17. The plaintiffs requested the members of the Georgia General Assembly who represent Burke County to introduce and enact legislation reactivating the government of Keysville, but the legislators refused.

18. Pursuant to Article V, Section II, para. VII of the Constitution of Georgia, "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law."

19. The plaintiffs and other residents of Keysville requested the Governor to

exercise his constitutional authority and appoint persons to the mayor and council of Keysville, but the Governor upon the advice of his Executive Council and the Attorney General refused to do so.

20. The Georgia General Assembly enacted Georgia Laws 1987, p. 178, which was precleared by the Attorney General of the United States and became effective on July 1, 1987, providing that:

> in the event that all seats on the governing authority of a municipality are vacant, the elections superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The Board of Registrars for the county shall prepare the electors list for the special election.

O.C.G.A. Section 36-30-13.

21. The office of the Attorney General of Georgia wrote to the Secretary of State concerning O.C.G.A. Section 36-30-13 dated

August 7, 1987.

22. The Burke County election board, pursuant to Section 36-30-13, called an election for January 4, 1988 to fill the vacancies in the municipal government of Keysville. The call for the election, together with a map designating the boundaries of the town and showing the area from which persons would be allowed to vote, were prepared by Burke County officials and submitted to the Attorney General of the United States pursuant to section 5. The submission was precleared on December 9, 1987.

23. On December 3, 1987, the plaintiffs in Poole v. Lodge, Civil Action No. 85-V-414, a group of white residents of Burke County, filed a motion to enjoin the county election board and board of registrars from conducting the January 4, 1988 elections on the ground that the

boundaries of Keysville had not been determined.

24. The superior court held a hearing on the motion on December 30, 1987 and, in an order entered December 31, 1987, enjoined the January 4, 1988 elections. The court also enjoined the defendants "from taking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly determined in accordance with the requirements of law."

25. On December 30, 1987, the plaintiffs filed a motion for a temporary restraining order and preliminary injunction in this case to enjoin the defendants from implementing the voting changes contained in the state court order absent preclearance under section 5. Judge Forrester, sitting as a single judge court, held a hearing on

the motion on December 31, 1987, at which counsel for the county and state defendants indicated that the voting changes contained in the state court order were required to be precleared under the Voting Rights Act prior to being implemented.

26. Following the hearing, Judge Forrester granted the plaintiffs' motion to join the Burke County Board of Elections and the Board of Registrars as additional party defendants, ruled that the voting changes contained in the state court order were subject to section 5, granted the motion for a temporary restraining order, and enjoined the defendants from failing to conduct the precleared January election.

27. The election was held as scheduled on January 4, 1988. Four blacks and one white were elected to the city council and a black was elected mayor.

On January 13, 1988, Judge Roney, Chief

Judge of the Eleventh Circuit, designated Circuit Judge J. L. Edmondson and District Judge Robert H. Hall to serve with Judge Forrester as members of a three-judge court to hear and determine the action pursuant to 28 USCA Section 2284(b)(1). The motion by James E. Poole, Jr., William C. Harmon, J. W. Marshall, Fred Muns, Louie B. Way, and Julian H. Kight to intervene was granted.

The three-judge court held a hearing on January 14, 1988 on the plaintiff's motion for a preliminary injunction. Based upon the foregoing evidence and after hearing oral argument, the court granted the preliminary injunction, reasoning that a state court may change a precleared election date or halt a precleared election only if the court first obtains preclearance of its order. The parties consented to the use of the record developed at the hearing as the basis for the court's ruling on the

plaintiff's motion for a permanent injunction. The court directed the parties to submit post-hearing briefs and took the plaintiffs' motion for a permanent injunction under advisement.

II. DISCUSSION. 1

Section 5 of the Voting Rights Act, found at 42 USC 1973c, requires that any

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1 Though the intervenors objected at the January 14 hearing that venue in the Northern District is improper under 28 USC 1391 -- because arguably the claim arose in the Southern District and the Burke County defendants reside there -- it is not necessary for the court to decide which district is the proper venue for this case. First, venue is a personal privilege that cannot be raised by one party on behalf of another, Camp v. Gress, 250 U.S. 308, 316 (1919), and that is waived if it is not raised. See, e.g., Leroy v. Great Western United Corporation, 443 U.S. 173, 180 (1979). The Burke County defendants stipulated at the hearing that they do not object to this venue. Second, an intervenor cannot object to venue. See, e.g., 3B Moore's Federal Practice para. 24.19 at 24-901. Finally, the intervenors here appear to have dropped the objection, since they do not raise it in their post-hearing brief.

state or political subdivision covered by the Act submit to federal scrutiny "any voting qualifiction or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The requisite "preclearance" may be obtained in one of two ways:

> First, the State or political subdivision may institute an action in the District of Columbia for a declaratory judgment that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; second, it may submit the proposed change to the Attorney General. No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object to a proposal submitted to him. Attempts to enforce changes that have not been subjected to section 5 scrutiny may be enjoined by any three-judge district court in a suit brought by a voter or by the Attorney General on behalf of the United States.

United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642, 645 (1977) (citations omitted).

It is undisputed in this case that the superior court order at issue applies to a political subdivision covered by the Voting Rights Act and that the order has not been precleared. The parties agree that the superior court order, if it enacts a change in voting procedure within the terms of section 5, must be precleared. See Hathorn v. Lovorn, 457 U.S. 256 (1982). In deciding this section 5 action, this court does not sit to determine whether the superior court order does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color" or to determine the validity of the superior court's interpretation of Georgia law. The only question before this court is whether the superior court order effects a change in

voting requirements that must be precleared under section 5 before being enforced.

The intervenors, the only parties opposing preclearance of the superior court order, advance several arguments against extending the preliminary injunction into a permanent injunction. None of the intervenors' arguments are persuasive. First, the intervenors argue that the superior court order did not effect a change in voting requirements under section 5 because the order changed neither the boundaries of Keysville nor the manner of holding elections there, because it did not institute a practice different from that in effect on November 1, 1964, because the January 4, 1988 election had not yet occurred and was therefore not yet a practice, and because the Attorney General had no previous practice with which to compare the superior court order.

Whether or not the superior court order changed the boundaries of Keysville, it is clear that the order did, at the least, change the date of the election, if not halt it altogether. A change in the date of an election, even if effected merely to comply with a statute that had already received clearance, requires approval by the Attorney General under section 5. NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985). The fact that the superior court order did not purport to change the boundaries of Keysville is irrelevant since the date change alone was sufficient to require preclearance.2

Contrary to the intervenors' textual argument, i.e., that the superior court

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2 It should also be pointed out that the preclearance itself had not changed the boundaries of Keysville either.

order effected no voting change since the practice in Keysville on November 1, 1964 was the same as that resulting from the superior court order, the benchmark for determining whether voting practices have changed is the most recent precleared practice if that practice post-dates November 1, 1964. See NAACP, DeKalb County Chapter v. State of Georgia, 494 F.Supp. 668, 677, (N.D.Ga. 1980) (three-judge court); 28 CFR section 51.54(b) ("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction"). As the court noted in NAACP, "the exact language of the statute would support" the intervenors' reading of section 5, but that reading "would lead to a result tantamount to repeal of the Act." 494 F.Supp. at 677.

Second, the intervenors argue that the superior court order is merely a judicial

decision enforcing previously precleared election law, specifically Georgia's residency requirement. Since the court determined that the town's boundaries were indeterminate, the argument goes, it could not be said that the electors identified by the county officials were residents of Keysville. In arguing that judicial decision construing precleared election law need not be precleared themselves, the intervenors rely heavily on Williams v. Sclafani, 444 F.Supp. 895 (S.D.N.Y. 1977) (three-judge court). 3 In Williams, the New York City Board of Elections informed a plaintiff candidate that persons registering on the street pursuant to New York's recently enacted mail registration statute

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3 This decision is not a precedent binding upon this court.

could simultaneously sign his designating petitions. In a subsequent suit in state court, the state supreme court held that the City Board's interpretation was erroneous and invalidated a number of the signatures on the plaintiff candidate's designating petitions. The district court held that "section 5 was not intended to cover a change in ... practice ... brought about by a state court decision construing or interpreting an already precleared state voting statute." Id. at 903. The intervenors argue that in this case, just as in Williams, the state's precleared election law was misinterpreted initially and that the state court's correction of the misinterpretation is not a change in practice that must be precleared.

Williams has no application to this case. First, the holding in Williams was based largely on that court's conclusion

that all state court decrees are outside the coverage of section 5. Id. at 903-04. That holding was repudiated by the Supreme Court in Hathorn v. Lavorn, 457 U.S. 255.

We note that the foundation of the intervenors' argument on this point is questionable. Careful analysis of the superior court order shows that the superior court did not construe the residency requirement -- nor did it rule that the county officials lacked the authority under the statute to determine Keysville's boundaries -- but instead held that, as a matter of fact, Keysville's boundaries could not be determined at all. That determination itself might be a change from the county officials' precleared conclusion that Keysville's boundaries could be determined.

Second, the intervenors argue that requiring preclearance of the superior court

order, "by logical extension," will lead to pernicious results. The intervenors argue that if preclearance is required here, it should also be required of any state court order entered in an election contest that changes election results or requires new elections. That question is not before us and need not be decided here. We do, however, note a difference between the two situations: results of elections are not normally precleared. A successful election contest that effects a change in election results may not need to be precleared if the election contest itself were conducted pursuant to precleared election law on election challenges. In such a situation, cases such as Williams may continue to have some application. The intervenors also argue that requiring preclearance in cases such as this allows state officials, who would normally be without power to do so, to

change municipality boundaries by submitting new boundaries for preclearance to the Attorney General. As the plaintiffs point out, however, it is highly unlikely that this course of events would ever occur and, it if were to happen, the improper but precleared boundaries may easily be changed by again submitting proper boundaries for preclearance.

Finally, the intervenors argue that if the superior court order must be precleared before being given effect, so that the January 4, 1988 election must be allowed to stand, the intervenors are without an adequate remedy for what they perceive to be a violation of state election law. Simply because the intervenors may not prevail in their post-election contest, presently pending in the state courts, however, does not render that remedy inadequate. Moreover, the intervenors remain free to

petition their legislators to remedy the situation by legislatively defining the boundaries of Keysville.

III. CONCLUSION.

In summary, the court concludes that its ruling on plaintiffs' motion for a preliminary injunction was correct. The superior court order changed a previously precleared practice and therefore should also have been precleared. The plaintiff's motion for a permanent injunction is GRANTED and the defendants are permanently enjoined from departing from the voting practices precleared by the Attorney General without obtaining preclearance for any subsequent changes, by judicial order or otherwise.

IT IS SO ORDERED this 30th day of June, 1988.

/s/ J. L. Edmondson

J. L. EDMONDSON

UNITED STATES CIRCUIT JUDGE

/s/ Robert H. Hall

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

/s/ J. Owen Forrester

J. OWEN FORRESTER

UNITED STATES DISTRICT JUDGE

EXHIBIT 2

IN THE SUPERIOR COURT OF BURKE COUNTY,
STATE OF GEORGIA

JAMES E. POOLE, JR., First Plaintiff, et al.	) CIVIL ACTION NO. 85-V-414
v.	)
HERMAN LODGE, Individually and as a member of the Burke County Board of Commissioners, First Defendant, et al.	) COURT'S ORDER ON PLAINTIFFS' MOTION FOR CONTEMPT, MOTION TO ADD A PARTY DEFENDANT AND MOTION TO EXPAND THE EXISTING INJUNCTION

The Plaintiff's Motion for Contempt, Motion to Add a Party Defendant and Motion to Expand the Existing Injunction having come before the Court for hearing on Wednesday, December 30th, 1987, the Court, after hearing the evidence, does hereby

enter the following findings of fact and make the following conclusions of law.

FINDINGS OF FACT

The Court finds that pursuant to the provisions of Act 160 of the 1987 Georgia General Assembly, Ralph B. Willis, as Superintendent of the Burke County Board of Elections, recently began making preparations for the holding of a special election for the municipality of Keysville, Georgia to fill the vacancies which presently exist with regard to the council and mayoral seats for Keysville, Georgia. In order to assist in his preparation for the election, Mr. Willis was provided with a map purporting to delineate the municipal boundaries for the town of Keysville, Georgia. The map had been prepared by James H. Bailey, the Chief Tax Appraiser and Tax Assessor for Burke County, Georgia. The purported municipal boundaries as prepared

by Mr. Bailey were shown on a Burke County tax map. Mr. Bailey prepared the map delineating the purported boundaries of Keysville after undertaking research in the Burke County record room attempting to locate the center of town.

Pursuant to the Act of Incorporation incorporating the town of Keysville, which Act was approved December 29th, 1890, the boundaries of the town were defined as extending "one-half mile in every direction from the schoolhouse now located in said town of Keysville". Mr. Bailey testified that in examining the Burke County records, he had discovered information which "I felt like indicated where the center of town was at". The deeds upon which Mr. Bailey testified that he relied in seeking to located the old schoolhouse were inconsistent in a number of ways. Mr. Bailey testified that based on his research,

he was unable to locate definitively either where the old schoolhouse or the schoolhouse lot was located in Keysville in 1890 and that the location which he chose for the center of town in preparing the boundary survey for the municipality of Keysville, was an approximation as to where he thought the schoolhouse would have been located inasmuch as he felt it was impossible to presently make any exact determination as to where the schoolhouse was located in Keysville in 1890. Mr. Bailey testified that his location for the center of town was just an estimation as to the location of the Academy or schoolhouse lot in 1890. The Court finds specifically that in making his approximation as to where the center of town was located, Mr. Bailey was apparently not aware of and did not rely upon a deed subsequently produced by the Defendants, which deed is dated November 16th, 1892 and

purports to convey unto the Burke County Board of Education a lot "known as the Academy lot" in the town of Keysville.

The Court finds that in beginning his preparations for the upcoming elections, Ralph Willis, the Elections Superintendent for Burke County, has accepted the map prepared by Mr. Bailey at its face value as correctly delineating the boundaries of the town of Keysville. Mr. Willis has used the boundaries as delineated on the map in making any determintion relative to the eligibility of candidates and intends to use these boundaries in determining the eligibility of electors voting for candidates within the town of Keysville.

The Court finds that in addition to the title work done by Mr. Bailey in attempting to locate the schoolhouse for purposes of delineating the Keysville municipal boundaries, the Attorney General's office

for the State of Georgia retained the services of John R. Murphy, a special Assistant Attorney General from Louisville, Georgia. Mr. Murphy was retained by the Attorney General's office for the purpose of attempting to locate from the public records of Burke County the location of the old schoolhouse that existed in 1890. Mr. Murphy in his search found no deed that described the school property as such. Mr. Murphy indicated that he did not think anyone could say for sure where the Academy property was located in 1890 and that it was impossible for him to determine definitively either where the old schoolhouse or schoolhouse lot was located. Mr. Murphy reached an opinion as to where the most likely location of the school property was, but that he could not, from his findings, direct a draftsman so as to enable him to draw a line with a circumference of one-half

mile and accurately depict the municipal boundaries of Keysville as those boundaries were set out in the Act of Incorporation of the town.

The Court further finds that the State Law Department of the State of Georgia has also undertaken an investigation in order to seek to determine the exact municipal boundaries for the town of Keysville. The Court finds that in addition to employing a special Assistant Attorney General in order to do title research, an employee of the State Attorney General's office did independent research seeking to locate information which would enable the boundaries of the town to be set. The Court finds that based on the research that was done by the Attorney General's office, the exact site of both the schoolhouse and the schoolhouse lot was incapable of determination. The Court further finds that

the Attorney General's office has, in the past, advised the Governor of the State not to appoint councilmen and a mayor to fill the existing vacancies for the municipality fo Keysville, in part because of the uncertainty of the location of the boundaries of the town. The Court finds that, at best, the Attorney General's office could delineate a general area with undefined limits within which the schoolhouse was probably located; however, at no time did the office of the Attorney General conclude where the actual municipal boundaries lie.

The Court finds that the deeds relied upon by Mr. Bailey and Mr. Murphy and the Attorney General's office in attempting to locate the old schoolhouse and in generalizing their location of the center of town for purpose of determination of the municipal boundaries are as follows:

1. A deed from L. A .Clark to Thomas B. Daniels dated April 7, 1890 and recorded in the Burke County Clerk's Office in Deed Book V, at pages 77-78. This deed conveys a three acre tract of land located gneerally within the area known as Keysville.

2. A deed from Thomas B. Daniels to Augusta Glass Works dated April 9, 1890 recorded in Deed Book V, at pages 77-78 of the Burke County Clerk's Office conveying a one acre parcel of the three acres received by Daniels from Clark.

3. A security deed from Augusta Glass Works to F. M. Whitney dated August 31, 1893 and recorded in the aforesaid Clerk's Office in Deed Book X, at pages 444-445. This security deed conveys to Whitney a security interest in two parcels of property owned by Augusta Glass Works. One of the two parcels of property conveyd is the one acre tract obtained from Thomas B. Daniels in the deed

noted above.

4. A deed from Phil P. Johnston to the Trustees of the Methodist Church dated November 22, 1894, recorded in Deed Book 5, at page 483 of the aforesaid Clerk's office. This deed conveys a lot of approximately seven-tenths of an acre.

All of the above-referenced deeds in some way reference the Keysville Academy property. The deed from Clark to Daniels indicates that the three acre tract conveyed is bounded "on the North by lands of Mrs. M. F. Cook and lot of Keysville Academy". The deed from Daniels to Augusta Glass Works conveying the one acre parcel indicates that the one acre parcel is bounded "on the North by lands now or formerly belonging to Mrs. M. F. Cook and lot, the Keysville Academy". The security deed from Augusta Glass Works to Whitney contradicts the deeds from Clark to Daniels and Daniels to Augusta Glass

Works in that it describes the one acre parcel owned by Augusta Glass Works which was purchased from Daniels as being bounded "East by lots of Thomas B. Daniels and Academy". It is, therefore, impossible to determine from these deeds whether the Academy lot was located North or East of the one acre tract owned by Augusta Glass Works.

The deed from Phil P. Johnston to the Trustees of the Methodist Church is dated November 22, 1894. Attached to the end of the deed and apparently recorded simultaneously with the deed is a plat or drawing of the seven-tenths acre lot being conveyed to the Methodist Church. As shown on this drawing or plat, the lot conveyed to the Methodist Church is bounded North by lands of Bradshaw, East by lands of Clarke, South by the Academy lot and West by lands of Daniels. The plat, however, is dated August, 1887, some seven years before the

date of the deed. The narrative description contained within the body of the deed completely contradicts the plat or drawing attached at the end of the deed to the extent that it recites that the land conveyed is "located and bounded on all sides by other lands of said Phil P. Johnston". Both Mr. Bailey and Mr. Murphy, in arriving at their generalized location for the center of town, relied heavily on the plat attached to the deed from Johnston to the Methodist Church.

Neither Mr. Bailey nor Mr. Murphy, when they undertook to locate the center of town, had the benefit of the 1892 deed from T. S. Clarke to the Burke County Board of Education. This deed was discovered in the Burke County Board of Education files and apparently had been delivered to the Board of Education, but never recorded. The deed

is dated November 16, 1892 and recites that it conveys a four-fifths acre tract located in the town of Keysville "known as the Academy lot". The deed recites that the property conveyed is bounded on the North by a public street, South by lot of T. B. Daniel, East by a vacant lot and "West by Mrs. M. F. Cook and Augusta Glass Co.". This deed would tend to contradict the plat attached to the Methodist Church deed to the extent that the schooldeed indicates the Academy lot was bounded on the North by a public road and not the Methodist Church lot. The Methodist Church plat, however, appears to depict the Academy lot as being located immediately south of the Methodist Church lot and adjoining the Methodist Church lot. There is no reconciliation of this conflict. The school deed also contradicts and conflicts with the descriptions contained in the deeds from

Clark to Daniels and Daniels to Augusta Glass Works. The school deed, is however, consistent with the description contained in the security deed from Augusta Glass Works to Whitney in that this security deed indicates the one acre parcel being conveyed is bounded on its East by the Academy and the school deed indicates it is bounded on its West by lands of Augusta Glass Company. Notwithstanding this agreement between these deeds, exact placement upon a plat or map of the lot conveyed to the Board of Education is impossible inasmuch as only a generalized location for the lot can be determined and further inasmuch as the deed to the Board of Education contains no lot dimensions, but rather only indicates that the lot size is four-fifths of an acre.

A 1906 plat of the town of Keysville also appears consistent with the Whitney security deed and the school deed in that it

depicts the one acre Augusta Glass Works property as having on its Northern boundary a lot owned by Mrs. M. F. Cook. Accordingly, to the extent that the school deed is correct and the school property was bounded on the West by lands of Cook and Augusta Glass Works, the center of town would have to be moved some 200 to 250 feet Southwest of the location presently used by Mr. Bailey to depict the town boundaries. The Court finds, however, that notwithstanding the generalized location of the school lot that could be made from these deeds, there is no evidence of the exact location or dimensions of the lot or of the exact location of the schoolhouse itself upon which the municipal boundaries were based.

In addition to the above evidence, the Court finds that the Defendants have submitted various affidavits which were

considered as evidence by the Court. One of the affidavits was given by one of the oldest living citizens of the Keysville area. This affidavit given by Mr. Henry Key indicates that he was born on August 8, 1895. Mr. Key's affidavit further indicates that "at the time of the incorporation of Keysville in 1890, a school for white students on which the city limits of Keysville is based and which was known as the Keysville Academy stood just Northeast of the present location of the Keysville Methodist Church next to a grove of large oak trees". The location which Mr. Key gives for the schoolhouse is some 300 feet Northeast of the location which is being used for purposes of the upcoming election. The location which Mr. Key gives for the schoolhouse is some 600 feet Northeast of the location for the Academy lot that is suggested by the Augusta Glass Company to

Whitney security deed and the Clark to Burke County Board of Education school deed. Although Mr. Key's affidavit indicates that he never personally saw the schoolhouse inasmuch as it was destroyed at approximately the time of his birth, the affidavit indicates that his information is based upon "conversations and discussions that I have had with my parents who were lifelong residents of Keysville and other residents of the Keysville area during my lifetime".

In addition to that affidavit, an affidavit of Mr. Roy Chalker, Publisher of the True Citizen, the official gazette for Burke County, Georgia, was offered. Mr. Chalker's affidavit had attached page 3 of an issue of the True Citizen dated March 7, 1891, less than three months after the incorporation of the town. That article indicated that there were problems in

locating the boundaries of Keysville even at that point in time. The article notes that at the time the town was incorporated "(U)nfortunately, the limits were not sufficiently circumscribed". It is, therefore, apparent to this Court that the problem with locating the municipal boundaries is not a new problem. All of evidence produced by the Defendants at the hearing does nothing to clear up the substantial conflicts which exist as to the location of either the schoolhouse or the lot upon which the schoolhouse sat. In fact, the Key affidavit and the Smith affidavit which had attached the deed from Clark to the Burke County Board of Education both contradict the location which has been selected by the County for use as the center of town.

The Court finds that based on all of the testimony given and all of the evidence

received by the Court, it is impossible even to delineate the boundaries of a lot or any number of lots on which the school might have been located. The best that can be done is to generalize areas where the lot might have been located.

The Court finds that as to the exact boundary line of the town, there is nothing less than absolute confusion. The Court finds that not only is there substantially conflicting evidence as to the location of the lot upon which the schoolhouse sat in 1890, but also that there is absolutely no evidence in the record as to where the schoolhouse itself was located. The Court finds that the present map purporting to delineate the municipal boundaries of Keysville were prepared based on an approximation of the location of the lot upon which the schoolhouse was located. The Court finds that there is no evidence of the

exact location or dimensions of any of the lots upon which the school may have been located and that no determination of the location of the schoolhouse itself has been made. The Court further finds that at best a generalized location of the school lot could be made, which location would be approximately 600 feet long and 200-300 feet wide. Based upon the evidence, any more accurate or narrow delineation of the lot appears impossible.

The Court finds from the evidence that any move in the generalized location of the center of town would substantially affect the number of persons who could vote in any election for the municipal offices for the town of Keysville and would also affect the eligibility of three of the announced candidates for office.

The Court finds that the boundaries of the town of Keysville which were submitted

to the United States Attorney General's office for preclearance pursuant to the provisions of Section 5 of the Voting Rights Act were improperly determined and are not supported by the evidence. The Court, accordingly, finds that those boundaries do not accurately depict the municipal boundaries of the town of Keysville in accordance with its Act of Incorporation.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes that it is proper for Ralph B. Willis, the Superintendent of the Burke County Board of Elections, to be made a party to this action and it is hereby ordered that the said Ralph B. Willis be made a party to this action and be served with copies of all pleadings previously filed in this case, together with a copy of this Order.

IT IS FURTHER ORDERED that the

municipal elections scheduled for the town of Keysville for January 4th, 1988 be and they are hereby enjoined; it being the determination of this Court that a determination as to the eligibility of candidates for the municipal offices and a determination as to the elgibility of voters for the municipal elections is impossible because of the inability to properly delineate the municipal boundaries in accordance with the Act of Incorporation for the town. The Court finds that there is no sufficient evidence to carry any burden with regard to a proper location for the center of town.

It is this Court's conclusion that the entry of this Order does not enact or seek to administer any standard or procedure with respect to voting different from that in force or effect on November 1, 1964. The Order of this Court does not in any way

change the municipal boundaries as submitted to the Attorney General's office for preclearance pursuant to Section 5 of the Voting Rights Act, but rather determines that the location of those boundaries is not supported by the evidence. Accordingly, this Court concludes that this Order is not subject to Section 5 preclearance.

IT IS FURTHER ORDERED that the Defendants are restrained and enjoined from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law.

It appearing to the Court that the Defendants have acted in good faith, no finding of contempt will be made against any of the Defendants.

SO ORDERED, this 31st day of December,